1968

State of Utah v. Darwin Olsen : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

vs.

DARWIN OLSEN,
Appellant.

Case No. 10871

BRIEF OF RESPONDENT

Appeal from the Judgment of the First Judicial District Court, Cache County, State of Utah
Honorable Ferdinand Erickson, Judge, sitting by invitation

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STATEMENT OF THE NATURE OF CASE

The appellant, Darwin Olsen, appeals from a conviction of the crime of burglary in the second degree in the First Judicial District Court, Cache County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was charged by information with the crime of burglary in the second degree. Appellant

waived jury trial and the matter was heard November 29, 1966, by the Honorable Ferdinand Erickson, Sixth Judical District, sitting by invitation, and appellant was found guilty. Sentence was imposed January 4, 1967, of confinement in the Utah State Prison for the intermediate term as provided by law of not less than one nor more than twenty years.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the First Judicial District Court should be affirmed.

STATEMENT OF FACTS

The respondent, State of Utah, submits the following statement of facts as being more in keeping with the rule that evidence will be reviewed on appeal in a light most favorable to the trial court's determination.

During the night of March 3-4, 1966, the Hyrum Drug Store, Hyrum, Utah, was entered and a quantity of narcotic drugs was taken from a locked cabinet within the store (T. 13). There had been a light snowfall that night and two sets of tracks were seen leading from the rear of the store through an adjacent pasture and then northward back to the main road (T. 116). One track was narrow-toed and small heeled, akin to an Italian boot. The other was a round-toed shoe mark (T. 117).

Dennis Hunt and Mary Jones, the two State witnesses, testified that appellant and one Michael Nielson had accompanied them on the evening of March 3, 1966, on an automobile ride from Logan, Utah, to Pocatello, Idaho, back to Logan, Utah, then to Hyrum, Utah, and finally to Ogden, Utah (T. 52, 54).

They stopped at appellant's home and appellant brought out a crowbar (T. 54). While Mary Jones was inside of the vehicle with the windows up (T. 57), Hunt, Nielson, and appellant were involved in a discussion as to a possible breaking and entry somewhere in Hyrum (T. 56).

Hunt parked his vehicle approximately one block north of the Hyrum Drug Store and appellant and Nielson left the vehicle carrying the crowbar and an empty zippered bag (T. 58). Hunt and Mary Jones then drove around Hyrum for thirty to forty minutes until returning to pick the two up. While so stopped, the Hunt vehicle was seen by an eye witness (T. 43).

Mary Jones testified that she saw the two men go across the pasture toward the store and that she later heard a screeching noise coming from the store (T. 132).

When appellant and Nielson returned to the vehicle, the zippered bag was full of bottles (T. 132). The four then returned to Ogden, Utah, where the bag was opened revealing numerous types of narcotics; labels were scraped off several bottles by Nielson and appellant (T. 135). During this period, Nielson was wearing

pointed toed shoes with a small heel (T. 136). These narcotics were later turned over to the Cache County Sheriff's office by Hunt and identified by the owner of the drug store as coming from his supply by the cost codes on the bottles (T. 21, 22).

ARGUMENT

POINT I

STATE'S WITNESS, DENNIS HUNT, WAS NOT AN ACCOMPLICE AS A MATTER OF LAW; THEREFORE, HIS TESTIMONY REQUIRES NO CORROBORATION.

Appellant attempts to show that one of the State's witnesses, Dennis Hunt, was an accomplice to the crime for which appellant stands committed and, therefore, this testimony requires corroboration to be admitted. Utah Code Ann. § 77-31-18 (1953).

Respondent would say only that in no way does appellant's characterization of Hunt ring true. Hunt had no hand in the planning of the burglary of this specific store. He only had some notice that appellant and Nielson were planning a job "somewhere in Hyrum" (T. 56). The mere knowledge that a crime is about to be committed does not constitute such person an accomplice, no matter how reprehensible such conduct may be. *State v. Mercer,* 114 Mont. 142, 133 P.2d 358 (1943).

The fact that the parties were using Hunt's automobile is not sufficient in and of itself to make him an accomplice and the theory of Hunt being a lookout defies common sense. Hunt was seen waiting over one block away by an eye witness (T. 43).

Both Hunt and Mary Jones testified that they drove around the town of Hyrum awaiting the return of appellant and Nielson. They returned to the meeting area too early then drove around for several more minutes (T. 131). A mobile lookout is a rather novel innovation when the lookout is driving several blocks from the scene of the crime and stopping to rest indiscriminately.

The further fact that he did not report the crime to the police during or immediately after its commission does not make him an accomplice, but only possibly an accessory under Utah Code Ann. § 76-1-45 (1953), providing: "All persons who, after full knowledge that a felony has been committed, conceal it from a magistrate, or harbor and protect the person who committed it, are accessories." This court had held that accessories are *not* accomplices within the meaning of Utah Code Ann. § 77- 31-18 (1953), or its predecessors, requiring corroboration of accomplices' testimony. *People v. Chadwick,* 7 Utah 134, 25 Pac. 737 (1891); *State v. Bowman,* 92 Utah 540, 70 P.2d 458, (1937).

There was much made of the fact that Hunt was apparently working for the Federal Bureau of Investigation as an informer. He was supposed to attempt to

obtain information about car theft activities of appellant and Nielson (T. 100). The fact that he actually informed on appellant for a burglary involving narcotics would not seem to deprive him of his status of an informant, as it has been held one who under the direction of an officer *or on his own initiative* feigns complicity in a crime in order to detect the perpetrator is not an accomplice, *People v. Piaschik,* 159 Cal. App.2d 622, 323 P.2d 1032 (1958).

In *Hyde v. State,* 73 Tex. Crim. 452, 165 S.W. 195 (1915), a witness, who when a burglary was suggested seemingly consented, stood along side the building while it was being burglarized, and accepted part of the money stolen, which he later turned over to the police and identified the men who committed the burglary, was held not to be an accomplice:

> There are certain relations recognized by law in which voluntary cooperation of a person with the accused does not render such person an accomplice. Thus, those who cooperate with a view to aid justice by detecting a crime . . . even though . . . he unites and apparently approves . . . [is not an accomplice.] (Holmes v. State, 70 Tex. Crim. 214, 156 S.W. 1171 (1913).)

This court had held "an accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The cooperation in the crime must be real, not merely apparent." *State v. Coroles,* 74 Utah 94, at 98, 227 Pac. 203 (1929).

The respondent would submit that under no possible theory could Hunt be considered an accomplice; therefore, his testimony stands.

POINT II

STATE'S WITNESS MARY JONES WAS NOT AN ACCOMPLICE AS A MATTER OF LAW; THEREFORE, HER TESTIMONY REQUIRES NO CORROBORATION.

Appellant contends that Mary Jones, the other State witness, was also an accomplice. Respondent would submit that there was not one scintilla of evidence adduced at trial showing a prior knowledge by Mary Jones that this drug store was to be burglarized.

It was clear from the record that Mary Jones was not privy to any conversation that might have taken place concerning the burglary. She testified that when she saw appellant bring a crowbar from his home, she "figured something was up," but did not know what it was (T. 151). It was not until the car had circled the drug store three or four times that she had an indication that a burglary attempt was imminent (T. 154). Mary Jones admitted that she consumed some of the stolen narcotics and could therefore be liable under Utah Code Ann. § 76-38-12 (1953) for receiving stolen property, but this would not render her an accomplice as to the burglary whose testimony need be corroborated. In *State v. Bowman, supra,* where witness stored stolen

goods in his house, this court held that his testimony in the trial of defendants for the burglary need not be corroborated as he was an accessory or a receiver of stolen property; that being a distinct crime from the one which the defendant was convicted. "An accomplice is one who is liable to prosecution for the *identical* offense charged against the defendant on trial." *State v. Fertig,* 120 Utah 224 at 227, 233 P.2d 347 (1951). One who could not be *convicted* of the crime with which the defendant is charged is not an accomplice no matter how culpable his conduct in connection therewith may be. *State v. Cragun,* 85 Utah 149, 38 P.2d 1071 (1934).

Mary Jones lacked the essential element of being an accomplice, that of a common criminal intent shared with the principal offender.

Mere knowledge that a crime is about to be committed does not make on an accomplice. *State v. Mercer,* 133 P.2d 358 at 351, 114 Mont. 142 (1943):

> A person cannot be characterized as a principal simply because he is present while a crime is perpetrated provided he takes no part in it. He must render aid to the actor and share in the criminal intent of him who actually committed the offense . . .

People v. Wooten, 162 Cal. App.2d 804, 328 P.2d 1040 (1958), to the same effect *State v. Johnson,* 57 N.M. 716, 263 P.2d 282 (1953), *State v. Moczygemba,* 234 Ore. 141, 379 P.2d 557 (1963).

In a case strikingly similar factually to the present case, in which the two defendants got out of the car in which they, the victim, and the State's witnesses were riding to repair the car and while so engaged, out of earshot of the witness and victim, dicussed robbing the victim, and subsequently did so, giving the victims's wallet to the witnes for safekeeping, the Arizona Court held that in the absence of preconsent, mere presence at the scene of the crime does not make one an accomplice and the fact that the witness received stolen property did not make her an accomplice to the homicide whose testimony need be corroborated. *State v. Sims,* 99 Ariz. 302, 409 P.2d 17 (1965).

Respondent submits that Mary Jones was not an accomplice, and the fact that she may have been an accessory, a receiver of stolen property, or chargeable with some other offense does not make her an accomplice; therefore, her testimony need not be corroborated.

This attitude was shared by the trial court when it held that Mary Jones was not in any way a participant (T. 165), notwithstanding the fact that she shared in its fruits.

POINT III

NEITHER OF THE STATE'S WITNESSES WERE IN FACT OR IN LAW ACCOMPLICES, AND IN ANY EVENT, THERE WAS SUFFICIENT EVIDENCE ADDUCED TO CORROBORATE THEIR TESTIMONY.

Respondent has shown that neither Dennis Hunt nor Mary Jones were accomplices in the crime for which appellant stands convicted.

Corroborative evidence, to be sufficient need not go to all material facts but may be slight and entitled to a little consideration. *State v. Woodhall,* 6 Utah 2d 8, 305 P.2d 483 (1956); *State v. Virgil,* 123 Utah 495, 260 P.2d 539 (1953). It must be consistent with guilt and inconsisent with innocence and connect the defendant with the commission of the crime. Circumstantial evidence may constitute corroboration. *State v. Park,* 44 Utah 360, 140 Pac. 768 (1914).

The druggist and the sheriff testified that there were two sets of footprints leading from the back of the store across the field and one set had pointed toe and small heel marks (T. 136). Miss Jones and Mr. Hunt testified that the appellant and Mr. Nielson alighted from the car on the road and went across the field towards the drug store (T. 132). Mis Jones testified that Mr. Nielson had on boots with narrow toes and small heels on the night of the burglary and that he said he would have to "get rid" of them (T. 136).

The druggist testified that a door to the drug store had been pried off. Miss Jones testified that she heard a "screeching" sound coming from the vicinity of the drug store. These circumstances, taken together, respondent submits, constitute independent physical evidence which corroborates the witness' tetimony.

CONCLUSION

The facts in the instant case amply demonstrate that the trial court acted properly in finding appellant guilty of the crime charged. The legal claims of error on which appellant relies for reversal are wholly without merit. The two State witnesses were not accomplices and their testimony does not, therefore, require corroboration. This court should affirm.

Respectfully submitted,

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